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10 UNITED STATES BANKRUPTCY COURT
11 SOUTHERN DISTRICT OF NEW YORK
12

13 In re:

14 LEHMAN BROTHER HOLDINGS INC., et al,
15 Debtors
16
17
18
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Chapter 11

Case No. 08-13555 (SCC)

20 **OBJECTION TO LEHMAN BROTHERS HOLDINGS INC.'S SECOND MOTION**
21 **IN AID OF ALTERNATIVE DISPUTE RESOLUTION PROCEDURES ORDER**
22 **FOR INDEMNIFICATION CLAIMS OF THE DEBTORS AGAINST MORTGAGE**
23 **LOAN SELLERS**
24

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ALTERNATIVE DISPUTE RESOLUTION PROCEDURES ORDER FOR INDEMNIFICATION CLAIMS
OF THE DEBTORS AGAINST MORTGAGE LOAN SELLERS

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1 **COMES NOW** SELCO Community Credit Union (hereinafter “SELCO”), an
2 Oregon State Chartered Credit Union, by and through its Associate General Counsel, Eric J.
3 Kiley, and Objects to Lehman Brothers Holdings Inc.’s (hereinafter “LBHI”) Second Motion
4 in Aid of Alternative Dispute Resolution Procedures Order for Indemnification Claims of
5 the Debtors Against Mortgage Loan Sellers (hereinafter “Second Motion”). SELCO files
6 this objection with a pending motion before the court for *pro hac vice* admission of its
7 Counsel, Eric J. Kiley, in order to meet the filing deadline of May 3, 2016 at 4:00 p.m.
8 (Eastern Standard Time).

9
10 For the reasons provided in the Memorandum in Support below, SELCO contends
11 that LBHI’s Second Motion is fatally flawed, and therefore should not require SELCO, who
12 is not a party to this adversary proceeding, to participate in costly and time consuming
13 mediation for a matter in which LBHI has produced no admissible evidence that SELCO
14 should have any involvement in the ADR process associated with this adversary proceeding.

15 **MEMORANDUM IN SUPPORT**

16 **INTRODUCTION**

17 SELCO is a credit union based in Eugene, Oregon. Although LBHI admittedly
18 “cannot conclusively determine the existence of successor liability”, they baldly assert that
19 SELCO is a potential successor in interest to Frontier Investment Company (hereinafter
20 “Frontier”), because SELCO “continued Frontier’s mortgage lending operations” and
21 “[o]ne or more officers and managers of Frontier are now listed as employees of SELCO.”
22 Second Motion, Exhibit A p. 2. LBHI now seeks an order requiring SELCO participate in
23 mandatory mediation with LBHI, at SELCO’s own expense and despite the fact that LBHI
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1 has not presented even a modicum of admissible evidence to indicate SELCO is a
2 successor in interest to Frontier. SELCO is not named as a defendant in this adversary
3 proceeding, and has no relationship, contractual or otherwise, with LBHI regarding their
4 claims in the underlying adversary proceeding, and thus has no ability to mount a
5 meaningful defense to LBHI's claims or to have any basis for negotiating settlement in the
6 ADR process.

7
8 LBHI's Second Motion, like its First Motion in Aid of Alternative Dispute
9 Resolution Procedures Order for Indemnification Claims of the Debtors Against Mortgage
10 Loan Sellers (hereinafter "First Motion"), ignores due process, jurisdictional requirements,
11 violates procedural rules, and would require entities that were never in privity with LBHI
12 to expend significant resources to mediate based solely on LBHI's inaccurate and wholly
13 unsubstantiated assertions that the entities listed *may* be a *potential* successor in interest to
14 the named Defendants in the adversary proceeding.

15 **FACTS**

16 1. On May 29, 2014, LBHI, the Plan Administrator, filed a Motion for
17 Alternative Dispute Resolution Procedures Order for Indemnification Claims of the
18 Debtor's Against Mortgage Loan Sellers which was granted by the court on July 18, 2014
19 (the Order granting that motion hereinafter referred to as "ADR Order.") (Docket Nos.
20 44450 and 45277 respectively).

21
22 2. The ADR Order requires, *inter alia*, that the banks and other mortgage
23 lending institutions from which LBHI or its affiliates purchased mortgage loans
24 (hereinafter collectively the "Sellers") be compelled to negotiate with LBHI a potential

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1 resolution of LBHI's indemnity claims through participation in mandatory mediation.
2 Participation requires Sellers to appear in person in New York City, and subjects them to
3 sanctions if they refuse to participate. (Docket No. 45277).

4 3. On October 22, 2015, LBHI filed its First Motion. In that First Motion,
5 LBHI claims that some Sellers have been uncooperative or refused to participate in
6 mediation as required by the ADR Order. LBHI named numerous new entities, who were
7 never listed as defendants, and asked the court to extend the ADR Order to require any
8 named successors in interest to participate in mediation or face sanctions. (Docket No.
9 51241).

10 4. On October 16, 2015, three Objections to the First Motion were filed
11 (hereinafter collectively "First Objections".) Similar arguments were brought in each of the
12 First Objections. (Docket Nos. 51459, 51462, and 51464).

13 5. On December 1, 2015, the Court filed its Order in Aid of Alternative
14 Dispute Resolution Procedures Order for Indemnification Claims of the Debtor's Against
15 Mortgage Loan Sellers (hereinafter "First Order"), with the exception that the entities that
16 filed the First Objections were excluded from the definition of "Successors" for purposes
17 of the First Motion. (Docket No. 51575).

18 6. On April 22, 2016, LBHI filed its Second Motion, seeking to adhere the
19 ADR Order to a new list of alleged successors in interest to the Sellers. (Docket No.
20 52574). SELCO is listed in Exhibit A to the Second Motion as a successor to Frontier.
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1 **REQUESTED RELIEF**

2 SELCO hereby respectfully requests that the Court deny the Second Motion as to
3 SELCO. Alternatively, SELCO requests that the Court exclude SELCO from the definition
4 of “Successors” as used in the Second Motion, in the same manner that the Court did for
5 the Objectors to the First Motion in its First Order.

6 **ARGUMENT**

7 **The Second Motion Violates Due Process, Lacks Jurisdiction, and Fails to State a**
8 **Claim**

9
10 SELCO is not and has never been a party to this action. SELCO was not served
11 with a summons and complaint. SELCO is not listed as a defendant in any proceeding
12 brought by LBHI. Rather, LBHI is now attempting to force SELCO into costly mediation
13 by naming it in an exhibit to a motion on baseless and bald assertions that SELCO *might*
14 be a *potential* successor to a business that has been dissolved for eight years. LBHI
15 presents no colorable evidence that SELCO is a successor in interest, instead opting to
16 guess at whether it meets a strict exception to the successor liabilities laws without so
17 much as providing a declaration that it has reason to believe the “facts” it sets forth have
18 merit.

19
20 SELCO has never had a contractual relationship with LBHI in relation to this
21 proceeding, nor has LBHI provided even a shred of evidence that SELCO has any
22 obligation to LBHI, contractual or otherwise. Not only is it inequitable to force SELCO to
23 expend significant costs and resources to prove it is not a successor in interest, this
24 attempted shift in the burden of proof is unsupported by case law. This attempt by LBHI

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1 to bootstrap SELCO into an ADR agreement simply by mentioning it in an exhibit to a
2 motion is a meritless position that would result in significant costs to SELCO based on
3 nothing more than mere allegations with no admissible evidence introduced to justify such
4 an action.

5 Federal courts do not have inherent jurisdiction. Until an action has been
6 commenced, federal district courts have no jurisdiction to act. *In re Market Basket, Inc.*,
7 122 F. Supp. 321, 322 (W.D. Mo. 1954) (interpreting Rule 3, Fed. R. Civ. P.); *see also In*
8 *re Marion*, Case No. 05-67816 JPK, 2006 Bankr. LEXIS 4231, at *13 (Bankr. N.D. Ind.
9 May 1, 2006) (“Absent the filing of a valid initiating document, a federal court has no
10 jurisdiction with respect to anything[.]”). LBHI filed an adversary proceeding in which
11 Frontier is listed as a defendant. Thus, the Court has jurisdiction over Frontier, but LBHI
12 has not established that the court has jurisdiction over SELCO who is not a named party to
13 this proceeding.

15 The burden is on LBHI to establish that SELCO is a successor in interest to
16 Frontier. *Call Center Technologies, Inc. v. Grand Adventures Tour & Travel Pub. Corp.*,
17 635 F.3d 48, 52 (2nd Cir. 2011) (“the proponent of successor liability must offer proof that
18 one of the . . . exceptions to the general rule [that purchasers of assets do not assume their
19 predecessor’s liabilities] applies.”) However, LBHI includes no evidence whatsoever,
20 admissible or otherwise, that SELCO is a successor in interest to Frontier. In fact, LBHI
21 admits it “cannot conclusively determine the existence of successor liability.” Second
22 Motion at ¶ 22. Rather, LBHI points to “indicia giving rise to reasonable grounds to assert
23 that the Successors *may* be legally responsible.” *Id* (*emphasis added*).

1 At no time does LBHI indicate how it came to this “reasonable” conclusion. At no
2 point does it assert that the “indicia” specific to SELCO is sufficient to establish liability.
3 Rather, LBHI seeks to have SELCO expend time and expense to travel to New York to
4 prove in mediation that SELCO is not liable as a successor. This burden shift is
5 unsupported by any factual allegations or case law, and the “indicia” listed specific to
6 SELCO is both inaccurate and inconsequential to establish liability.

7
8 LBHI fails to even file a declaration stating under oath that the assertions have
9 some basis in truth, or were the product of firsthand knowledge. Quite simply, there is no
10 evidence in the record to support LBHI’s claim that SELCO is a successor in interest to
11 Frontier.

12 **The Second Motion Fails to State Facts Sufficient to Establish Successor Liability**
13 **Under Oregon State Law**

14 Even if LBHI’s Second Motion somehow survives its many procedural failings,
15 LBHI has failed to allege any fact which under Oregon law would open SELCO to
16 successor liability. The first and only mention of SELCO, or allegation that it is a
17 successor, can be found in Exhibit 1 to the Second Motion, which reads:

18 Information obtained by LBHI indicates the following: The original entity,
19 Frontier, was acquired by and operated as a wholly owned subsidiary of SELCO.
20 Although Frontier eventually dissolved, SELCO and/or another of its subsidiaries
21 continued Frontier’s mortgage lending operations. One or more officers and
22 managers of Frontier’s are now listed on the SELCO website as part of its
23 mortgage team.

24 Even taken at face value, this brief paragraph fails to allege sufficient facts to
25 establish successor liability under Oregon law. It appears that LBHI is asserting SELCO is

1 a mere continuation of Frontier. Even a cursory review of successor liability law in Oregon
2 would have alerted LBHI to the fact that operational continuity alone does not establish
3 liability. Additionally, LBHI's unsubstantiated claims of continuity of management falls
4 far short of case law cited by LBHI defining the "mere continuation" exception.

5 Oregon follows the traditional rule of successor liability; when one corporation
6 transfers all of its assets to another, the latter is not liable for the debts and liabilities of the
7 other. *Erikson v. Grande Ronde Lbr. Co.*, 162 Or. 556, 568 (Or, 1939) *see also Gonzalez v.*
8 *Standard Tools and Equipment Co.*, 270 Or. App. 394, 397 (Or, 2015). Oregon recognizes
9 only the four basic exceptions to this rule:

10
11 1) Where the purchaser expressly or impliedly agrees to assume such debts; (2)
12 where the transaction amounts to a consolidation or merger of the corporations; (3)
13 where the purchasing corporation is merely a continuation of the selling
14 corporation; and (4) where the transaction is entered into fraudulently in order to
15 escape liability for such debts. *Id.*

16 Oregon has explicitly and repeatedly refused to adopt the product line exception. See
17 *Dahlke v. Cascade Acoustics Inc.*, 171 P.3d 992, 998 (Or., 2007); *Gonzalez*, 270 Or App at
18 398. Thus, a successor company which continues to produce the same type of product as
19 the original company does not assume successor liability under Oregon law. *Gonzalez*, 270
20 Or App at 398-399.

21 LBHI never asserts that SELCO impliedly or expressly assumed Frontier's debts.
22 LBHI never asserts that SELCO expressly or *de facto* merged with Frontier. LBHI never
23 asserts that SELCO entered into a fraudulent transfer with Frontier. The closest to an actual
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1 allegation that SELCO in any way meets an exception to the general rule of successor
2 liability is under the “mere continuation” exception.

3 LBHI asserts that SELCO “continued Frontier’s mortgage lending operations.”
4 This assertion is untrue, and unsubstantiated. Additionally, because Oregon has expressly
5 rejected the product line exception, the mere fact that the surviving entity produces the
6 same “product” as the entity that dissolved does not establish successor liability. *See*
7 *Gonzalez*, 270 Or App at 398.

8 LBHI seeks to mislead the court that there was significant continuity of managers
9 or employees between SELCO and Frontier, enough to make SELCO a “mere
10 continuation” of Frontier. This is not the case. The best LBHI does is claim “[o]ne or more
11 officers and managers of Frontier’s are now listed on the SELCO website as part of its
12 mortgage team.” LBHI does not elaborate, does not cite the names of any single officer,
13 manager or employee or if they’re in the same or similar positions. LBHI fails to even cite
14 the web page it references.

15 According to LBHI’s Second Motion, the “mere continuation” exception applies
16 “when the corporation merely changes its corporate form, but otherwise continues
17 operations with the same management and shareholders.” Second Motion ¶ 35. Based on
18 the case law LBHI cites, it applies “where purchaser had essentially same management and
19 employees as seller, produced and sold similar product, used same facility, and selling
20 corporation was dissolved.” *Id.* at 36, *citing Fiber-Lite Corp. V. Molded Acoustical*
21 *Products of Easton, Inc.*, 186 B.R. 603, 609 (E.D. Pa 1994).

1 As LBHI states, Frontier was dissolved, however LBHI does not assert that
2 Frontier and SELCO ever shared a facility, nor did they. Frontier and SELCO both made
3 mortgages, however, as stated above, the product line exception has expressly been
4 rejected in Oregon, so that fact is irrelevant on its own to establish liability. Thus, LBHI
5 must be asserting that because “one or more officers and managers of Frontier are now
6 listed on the SELCO website as part of its mortgage team,” eight years after Frontier
7 dissolved, there is “essentially the same management and employees.”

8
9 LBHI makes no mention of who these alleged employees are, what positions they
10 held at either company, when they were hired by SELCO, or when they ceased working for
11 Frontier. The mere fact that at least one person who worked at Frontier happens to have
12 taken a position in their chosen field at SELCO, at some point in the past eight years since
13 Frontier dissolved, in no way establishes “essentially the same management and
14 employees.” Both SELCO and Frontier were centered in Eugene, Oregon. Eugene is a
15 small town with a small financial industry. It is not uncommon for persons to work at more
16 than one company throughout their career. Absent significantly more factual allegations,
17 LBHI’s assertions are wholly insufficient to show a continuity of management or
18 employees sufficient to establish successor liability under the mere continuation exception.

19 CONCLUSION

20
21 The Second Motion is procedurally flawed. It seeks to bootstrap SELCO, a party
22 unrelated to the current litigation, into a costly ADR process without following due process
23 of law and without establishing jurisdiction. In addition, LBHI fails to produce even a
24 single piece of admissible evidence to support its conclusions that SELCO is a successor in

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1 interest to a named party, instead relying on unsubstantiated and bald assertions to force a
2 stranger to this controversy to fly a representative across the country and “share” in the
3 costs of the ADR process. It would be highly inequitable to force SELCO to participate
4 and pay for mediation for a case to which it is not a party and has no knowledge enough to
5 negotiate a settlement based on an indemnification agreement to which SELCO was never
6 a party. Additionally, allowing the Second Motion would effectively switch the burden of
7 proof from requiring LBHI to show SELCO is a successor in interest, to forcing SELCO to
8 prove that it is not in costly mediation.
9

10
11 **WHEREFORE, BASED ON THE FOREGOING,** SELCO respectfully requests
12 that the Court deny LBHI’s Second Motion which would require SELCO to participate in
13 mandatory ADR, and refrain from enforcing the July 18, 2014 ADR Order against SELCO.
14 In the alternative, SELCO requests that the Court define “Successors” as it applies to the
15 Second motion to exclude SELCO from that definition.
16

17 Respectfully submitted this 3rd day of May, 2016

18 /s/ Eric J. Kiley

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